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IN THE

Supreme Court of the U. S.

October Term, 1888.

No. 72.

FREDERICK MEISSNER, CHARLES F. ACKERMANN AND CHARLES F. L. MEISSNER, APPELLANTS,

vs.

HERMAN BRUN, MASTER OF THE NORWEGIAN BARQUE "GAZELLE."

Appeal from the Circuit Court of the United States for the District of Maryland: In Admiralty.

BRIEF OF APPELLANTS.

S. T. WALLIS,
HENRY C. KENNARD,
For Appellants.

JOHN MURPHY & CO., PRINTERS, BALTIMORE.

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This controversy arises out of a Charter Party, which will be found on p. 4 of the Record, between the Appellee, as Master of the Norwegian barque "Gazelle" and the Appellants, Meissner, Ackermann & Co., merchants, of New York.

The vessel, as will be seen, was chartered for a voyage from the port of Baltimore, where she was lying, "to a safe, direct Norwegian or Danish port as ordered on signing the Bills of Lading, or as near thereunto as she can safely get and always lay and discharge

afloat." The Appellants had purchased, for transmission to the port of Aalborg, in Denmark, a cargo of refined petroleum, which they agreed to furnish the vessel at the freight called for by Charter Party. The other details of that Instrument, it will not be necessary to trouble the Court with, inasmuch as the controversy arises out of that portion which has been quoted. It will be found in full on page 4 of the Record. It is admitted by Appellee in his Libels (p. 2, Art. 5, and p. 6, Art. 6 of the Record), that the charterers provided the vessel with the prescribed cargo, and that it was put on board, the loading being completed by the 6th of July, 1881. On that day the charterers tendered to the Appellee Bills of Lading to be signed by him, and thereby ordered the vessel to Aalborg as her port of discharge, the Bills containing the words "Bound for Aalborg, or as near thereto as the vessel can safely get." The words "and always lay and discharge afloat" were subsequently added after the word "get" (Libel, p. 6). The Appellee refused to accept the Bills of Lading, alleging that Aalborg was not a safe port, and that it was impossible for the vessel to enter with or land cargo at said port or at any anchorage or landing place near the same, where she could safely get and always lie and discharge afloat. (Appellee's Answer, p. 20.) The charterers refused to make any alteration in the Bills and the Appellee thereupon positively refused to sign them or to leave the port with the cargo, and on July 11, 1881, (Rec. p. 1) filed a Libel *in rem* against the cargo, which was still on board, to recover demurrage. He subsequently filed three other additional and amended Libels, pp. 5, 11, and 13, and finally discharged the cargo and placed it in warehouse. (Libel, p. 13.) The Appellants, upon their part, on the 20th of August, 1881, after the removal of the cargo, filed a Cross Libel (pp. 16–19). Their Answers to the Original and Amended Libels will be found on pp. 8 and 14 of the Record. By their Libel, the Appellants claimed damages to the amount of $8,000 as against the

Gazelle, alleging, p. 18, that the refusal of the master to sign bills of lading to Aalborg would cause or had caused them to lose the sale of the cargo, and that the price of petroleum was declining, by reason of which the cargo had been left on their hands, on a falling market, at great loss. The entire damages claimed by the Appellee for demurrage in his several Libels amounted to $2,070.20, with $400 for expenses (Rec., p. 13), making $2,472.00 in all. The cases were consolidated and a very large amount of testimony was taken, which does not appear in the Record. The District Court sustained the Libels of the Appellee and dismissed that of the Appellant. Its decree was affirmed by the Circuit Court on appeal. The findings of fact and law, by the Circuit Court, appear on pp. 21–23 of the Record. Before proceeding to consider these, it will be convenient to state the course of the litigation, as developed by the respective Libels and Answers.

It is specifically averred in all the Libels, and admitted in the Answers, that the refusal of the master to sign bills for Aalborg was based, exclusively, on his contention that it was not a safe port, and that it was impossible for his vessel to enter it with cargo or to land cargo at the port itself or at any anchorage or landing place near the same, where she could safely get and always lay and discharge afloat. (See pp. 6–7.) He alleged (p. 7) that the only anchorage outside of the port is in the open water of the Kattegat, a place open on all sides seaward, and closed only on the west by the shore; that its only claim to be called an anchorage at all is, that the water is shallow enough to drop an anchor. Vessels of large size, such as the Gazelle, he alleged, are liable, in anchoring there, to be driven off by the winds and gales, or to draw anchor, or go ashore, or be compelled at any moment to raise anchors and get under way for the open sea. He insisted that the Gazelle, if taken there to anchor and unload into scows, lighters, or small

vessels, would be so taken and unloaded in peril of partial or entire destruction; that the port is known among mariners and insurers as not a safe port for any vessel except for those drawing less than 10 feet of water, and is not in fact a safe port except for such vessels, and that any vessel drawing over 10 feet of water could only unload cargo in the anchorage above mentioned, by transferring it while at anchor in the open Kattegat into small coasting vessels. The Appellants upon their part averred, both in their Answers (p. 9) and their Libel (pp. 17 and 18):

First. That the port of Aalborg is a safe, direct port of Denmark, within the direct terms and meaning of the Charter Party, and one to which vessels of the same draught of water as the Gazelle, and of larger draught, are habitually consigned and dispatched, with petroleum and grain, from the port of Baltimore and other Atlantic ports in the United States, and to which such vessels do habitually and safely proceed and get, and at which they may and do always lay and discharge safely afloat.

Second. That, apart from and concluding the question of fact, by the uniform custom and usage of trade between the Atlantic ports of the United States and the ports of Norway and Denmark, the port of Aalborg is known and recognized as being, and is universally known and understood by ship-owners and ship-masters to be such safe port as aforesaid, within the scope and meaning of the Charter Party in this case, and is universally intended to be embraced, as such a safe and direct port by the language used in the Charter Party, and within its meaning and intent. Of this usage, custom, and understanding the Appellants charge that the master was fully cognizant when the Charter Party was executed, and they say that he entered into the same, accordingly, with a view to it, and became bound thereby to proceed to said port and sign Bills of Lading therefor when so ordered (pp. 17 and 18.)

The appellee upon his part not only denied, as has been stated,

that the port of Aalborg was a safe port, and claimed that there was no landing place or anchorage near the same where his vessel could safely get and always lay and discharge afloat (p. 7), but, in his Answer to the Libel of the Appellants (Record, p. 20), he specifically and formally denied the allegation, that by the uniform custom and usage of trade between Atlantic ports and ports of Norway and Denmark the port of Aalborg is known and recognized as being, and universally known by ship-masters to be a safe Danish port, as alleged by the Appellants. He denies that he ever heard or knew of any such custom, and charges that if it did exist it is not valid, legal or material.

It will thus be perceived that there were two controlling issues of fact, distinctly made and joined between the parties.

The first was as to the actual condition and character of the port of Aalborg and its safety, apart from usage, and the other as to a uniform custom and usage of trade, between the Atlantic ports and the ports of Norway and Denmark, by which as Appellants alleged, the port of Aalborg was recognized and admitted to be safe within the language and meaning of the Charter Party. It was therefore essential to the adjudication of the case, upon its merits, that there should be a finding, by the Court, upon both of the facts thus alleged, because, as will be contended hereafter, although the port of Aalborg might not indisputably be within the literal scope of the Charter Party without reference to custom, yet, even if it were not, and the ship-master entered deliberately and advisedly into the Charter Party, with the knowledge of a uniform and universal custom and understanding in the Atlantic ports of the United States, by which Aalborg was recognized as a safe port, and was comprehended within the language used by the Charter Party, and he knew that it was so included, and was intended so to be included by the charterers in making the contract, it would be obligatory upon him at all events to make the effort to get

to Aalborg and to sign bills of lading to go there. It is further the fact and so found by the Circuit Judge (p. 21), that during the discussion which occurred between the charterers and the master in reference to signing bills of lading, the latter offered to sign bills for Aalborg, containing the words "or as near thereto as the vessel can safely get and always lay and discharge afloat," but, that when this was assented to by the charterers he changed his mind and refused, repeating the allegation that he knew the fact to be that there was no place near about, where he could safely lay and discharge, and as he knew beforehand that he would have to go to the nearest safe port, anyhow, he would not sign any bills of lading which might in any way commit him to anything else. The Appellants, on their part, always insisted upon having bills of lading signed for Aalborg, leaving, of course, to the master such action as might be necessary for the protection of the ship and cargo, in case that on arriving off Aalborg he should find that the state of the season or the weather rendered it unsafe for him to undertake to discharge his cargo outside of the bar.

The Circuit Court finds (p. 22) that the port of Aalborg is in Denmark, on the south bank of the Limfiord, about seventeen miles from its mouth at the Kattegat sea. At the mouth there is a bar about three thousand feet wide, on which there is ordinarily ten feet of water, and never more than eleven. Off the mouth of the Limfiord (according to the Court's finding) there is no sheltered bay or any indentation of the coast, but the coast runs in a straight north and south line. It is not possible, according to the Circuit Judge, for the Gazelle to pass the bar either in ballast or with cargo, and he finds that the only place of anchorage for a vessel which cannot cross the bar is in the Kattegat, off the mouth of the Limfiord, and the only discharge at said anchorage is by the use of small sailing coasters, which can pass the bar and carry the cargo up to the port. The Court adds, p. 22,

that a considerable commerce has been carried on with the port, from time immemorial, by vessels of small draught, able to cross the bar when loaded, and that in late years some steamers of larger draught have traded regularly with the port from England. These steamers "have lighters expressly made for their purpose, which they take in tow going out, receiving from them a part of their cargo when over the bar, and in returning, discharge into them sufficiently to lighten to ten feet and then tow the lighters in with them." The Judge further finds (p. 22) that "31 cargoes of petroleum and grain have been exported to the port of Aalborg from the United States since 1876; none before that time. Many of them were in vessels of such size as to be able to cross the bar after lightering a reasonable amount. Of these 31 vessels two or three, in all, of large size have discharged their whole cargo outside. The port of Aalborg and the Limfiord inside the bar," says the Court, (p. 22) "are safe for vessels that can get inside of them and lay afloat, and the water inside the bar in the Limfiord is deep, but the anchorage outside the bar is not a reasonably safe anchorage, nor a place where it is reasonably safe for a ship to lay and discharge." It will be observed that while the Court finds, generally, as matter of fact, that there is no anchorage outside of the bar nor any place there at which it is reasonably safe for the ship to lay and discharge, the other fact is distinctly admitted and found, that steamers of too large draught to pass over the bar have, for years, traded regularly with the port, from England, and have habitually lain outside, in the Kattegat, discharging so much of their cargoes into lighters as might be necessary to enable them to cross the bar. It is further found and admitted by his Honor, as will be noted, that out of 31 cargoes of petroleum and grain exported to Aalborg, since 1876, (when the trade with this country appears to have begun,) from the United States, many were in vessels of such size as to be able to cross the bar after lightering to a reasonable

amount. It is not stated that any of them were of sufficiently small draught to cross the bar without being lightered. It is further found and admitted that out of these 31 vessels two or three of large size have discharged their whole cargo outside, and there is no suggestion that there was any difficulty in their doing so, or that any of the vessels which have thus discharged cargo, in whole or in part, outside, have ever suffered from the weather, or that any vessel was ever lost or driven from the anchorage while engaged in either loading or unloading there. It is consequently the concession of the Court's finding that, as a matter of actual experiment, the anchorage outside has been constantly found safe, for vessels which were of too large draught to cross the bar with full cargo, and were compelled, for that reason, to discharge and did discharge, in whole or in part, outside. Necessarily, the only difference as to safety between the case of vessels discharging their entire cargoes outside and that of vessels making a partial discharge by lightening themselves so as to cross the bar, must consist in the length of time during which they are required to remain at anchor, and inasmuch as it is found by his Honor that there is a regular trade, and has been for years, between Aalborg and England, and that steamers from England habitually lie outside and discharge much or little, in proportion to their draught of water, and large vessels, like the Gazelle, unable to cross the bar, have discharged their whole cargoes outside in safety, it seems impossible to maintain that the port of Aalborg, from the experience of navigators, is one outside of which vessels may not lie in reasonable safety and discharge, or that the Appellee had the right to assume it to be such. The general finding of the learned Circuit Judge is necessarily subject to qualification from the particular facts likewise found; and it seems difficult, logically, to assert the impossibility, or the want of reasonable possibility, of safe discharge outside, in face of the finding, that such safe discharge is actually possible, being con-

stantly made. This view of the case is not only important in itself, but of large importance in determining the obligation of the Master, independently of any custom, to sign Bills of Lading for Aalborg. If apart from the custom, the port of Aalborg was known to the trade and to navigators, at the time the Charter was entered into, to be and actually was a port, at which vessels, large and small, can and do, habitually, lie outside and safely discharge their cargoes in whole or in part, it can hardly be contended that in entering into such a Charter Party as that in controversy, the ship-master would have a right to shut his eyes to such knowledge and assume that Aalborg was not a safe port of that sort. At most and worst, whether it was or was not would depend upon the ascertainment, on the spot, of a state of circumstances, which would render it impossible or unsafe for the Gazelle to do that which other vessels, large and small, were habitually doing in the every-day course of trade. If the master desired to assume for himself, apart from the experience of other navigators, that the anchorage outside was unsafe, it was his duty, in view of the fact that it was constantly found by others to be safe, to notify the charterers, at the time when the Charter Party was framed, that he did not mean to embrace Aalborg among the ports to which he might be ordered. As a matter of course it will be assumed that the ship-master, particularly a Norwegian ship-master, would be familiar with the number and character of the Norwegian and Danish ports to which, under the terms of the Charter Party, he might be sent. Those on the Danish coast are so very few indeed, in number (only two, including Aalborg), that the exclusion of one would seriously restrict the rights of the Charterers. It being impossible, as has been said, to deny, from the facts found by the Judge, that vessels are in the habit constantly of lying safely afloat in the anchorage outside the port of Aalborg and discharging their cargoes in whole or in part, the Charterers,

in the absence of any notice to the contrary by the ship-master, would have the right to infer that Aalborg was contemplated, along with the rest, by the master as well as by themselves, in a Charter in the general terms of that before the Court. Naturally (and it requires no finding of fact to arrive at that conclusion), a vessel expects to receive larger freight where a range of ports is given to the Charterer, than where a direct voyage to a single direct port is contracted for, and it would seem out of all reason to allow a ship-master the benefit of the enhanced freight which a range of ports would give him, and at the same time concede him the privilege of afterwards excluding any one or more ports within the range, on the assumption that it would not be safe for him to do there what other vessels were every day doing.

But it will be observed that while the learned Judge below has found as matter of fact upon the issue joined as to the reasonable safety of the anchorage outside of Aalborg, he has failed to find at all upon the other issue, quite as formally and distinctly joined, as to the custom by which the port of Aalborg is recognized in all the Atlantic cities of the United States as a safe port, where vessels like the Gazelle go safely and always lay and discharge afloat. It might be entirely true that independently of the custom, the master might have been entitled to the decree of the Court upon the facts as unaffected the custom, yet it is equally true that if the custom had been found, as alleged by the Appellants and denied by the Appellee, the Appellants would have been entitled to the decree of the Court, notwithstanding the facts found by the Circuit Court upon the other issue. In other words, it may be true that, apart from the custom, the master might have color of right to deny that the anchorage outside of Aalborg was within the terms of the Charter Party, and yet, if the custom exists, as alleged by the Appellants, the master would be bound to go to the port, he having deliberately contracted to do so, with a knowledge of the facts and of the meaning and obligations of his contract under the custom.

Assignment of Errors.

The appellants accordingly assign as error on the part of the learned Circuit Judge:

1st. That he failed to make any finding upon the important issue joined as to the existence of the custom which has already been considered.

2nd. That the facts of the finding, taken altogether, and apart from any question of the custom referred to, do not justify the Court's conclusion of law.

3rd. That the Court further erred in the amount of the damages awarded to the appellee, supposing that he was entitled to recover.

First: It will not be necessary to trouble the Court with much further comment upon the error which, it is respectfully submitted, was committed by the Court below, in failing to find upon the issue formally joined touching the custom in question. This Court, it is true, has always confined itself strictly, on appeal, to the facts found by the Circuit Court and the pleadings, and as a general rule has treated facts not found as not existing, for the purpose of review. But it is not supposed that these rulings have been intended to remove the obligation of the Circuit Court to find upon all material issues presented by the pleadings. In the case of the Annie Lindley, 104 U. S., 188, your Honors specifically say, "*When the Circuit Court has passed on all the issues,* we cannot listen to complaints that it has refused to find certain facts, &c., &c." In Clark *vs.* Fredericks, 105 U. S., p. 5, "The findings are conclusive as to the facts," says the Court, "*and they cover all the issues.*" So, in the case of the "Adriatic" (107 U. S., 512) the Court says that the sufficiency of a finding "*in connection with the pleadings,* to support the decree rendered, is always open to consideration on appeal." In the case of the "S. C. Tryon" (105 U. S., 270), as in the case of the "Adriatic," the Court has analogized the action of the Circuit

Court, in its findings, to the finding of a special verdict, and it is believed to be text law, that where separate issues are raised by the pleadings and submitted to a jury for any verdict, special or general, it is not competent for the Court to proceed to judgment, unless there is a finding upon every one of the issues that is material. "A verdict," says this Court in Prentiss *vs.* Zane, 8 Howard, 484, "which finds but part of the issue and says nothing as to the rest, is insufficient, because the jury have not tried the whole issue." "A *venire de novo* is grantable," says Tidd, (Pract., vol. 2, 922), "when the verdict, whether general or special, is imperfect . . . by finding less than the whole matter put in issue." And see, *ad idem*, Patterson *vs.* U. S., 2 Wheaton, 100. If issues were joined on pleas of *non assumpsit* and limitations, and the jury failed to find on the issue of limitations, counsel would hardly ask a judgment for plaintiff, because the verdict was for him on the first issue.

It is not supposed that the materiality of the issue as to the custom can be reasonably denied. It is not necessary to discuss the validity of a custom under which an engagement to do an illegal or impossible thing might be supposed to be imported into a contract which was silent in regard to it. This Court, speaking of contracts of affreightment, has said in the case of The Harriman (9 Wall., 161 162) that "if what is agreed to be done is possible and lawful, it must be done. Difficulty or impossibility of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot, by any means be effected." If, therefore, in view of the facts and possibilities admitted in the finding, as to the port of Aalborg and the course and experience of trade and navigation there, the Appellee had specifically named that port in the Charter Party, there is no room for doubt that he would have been bound to go there and unload, if he could. It would have been possible, and no illegality could attach to it. Clearly therefore a custom which would make the same obligation a part of his contract,

by necessary intendment, would be equally unimpeachable. A tacit obligation, implied in a contract, by law, from custom, is just as binding and unobjectionable as a contract in express words, and a custom implying nothing but what would be unobjectionable and obligatory if expressed cannot, it is submitted, be impugned. The issue as to the custom therefore involved the meaning and obligation of the contract, and not to find upon it was to leave those controlling questions undetermined.

Second. Whatever may be the opinion of the Court as to whether the first error is properly assigned, the Appellees respectfully submit that the legal conclusion arrived at by the Circuit Judge is not justified by his findings of fact, taken as a whole. "Upon the facts found, it must be true, as matter of law." (Sun Mut. Ins. Co. *vs.* Ocean Ins. Co., 107 U. S., 502.) The findings demonstrate the reasonable possibility of lying afloat and discharging cargo safely at the anchorage outside of the bar of the Limfiord, by showing, as has been said, that vessels do constantly, in fact almost every day, in trade, cast anchor in that locality and discharge their cargoes in whole or in part without difficulty. The case of the "Alhambra," 6 Law Reports, P. D., p. 68, decided in 1881, determined that when a vessel is chartered to proceed with a cargo to a safe port as ordered, or as near thereunto as she can safely get and always lay and discharge afloat, she is entitled not merely to have a safe anchorage outside the port, but to require that the port itself shall be one into which it is possible for her to get safely with her cargo and lay and discharge afloat. In other words, the two destinations, the port and the safe place outside the port, are not alternative, but one is entirely subsidiary to the other and the ship is entitled to a port, into which she can get under ordinary or some circumstances, with the depth of water which she will require when loaded. Although that case has not been expressly overruled, it is believed to be very doubtful whether

its doctrine would be approved by this Court. In the case of Dahl *vs.* Nelson *et al.*, Law Reports, 6 Appeal Cases, pp. 38, 43, 47 and 51, where the whole subject is discussed, it was held, by the House of Lords, that the destination called for in the Charter Party, by the language used, provided alternative destinations for the vessel, and it was substantially decided that a satisfactory port would be furnished if, either inside the port itself or at a reasonable distance outside, she could find a safe berth. And see, *ad idem*.

Capper *vs.* Wallace, L. R., 71 Queen's B. Div., 782.
Neilson *vs.* Wait, L. R., 14 Queen's B. Div., 516.
Carsanego *vs.* Wheeler, 16 Fed. Rep., 248.

It is true that the case of the "Alhambra" was not considered by the House of Lords when Dahl *vs.* Nelson was before them, it not having been decided, on appeal, until March, 1881, while the decision in the House of Lords bears date in January preceding, but it is believed that a comparison of the doctrines laid down by the House of Lords with the law as determined in the Alhambra case, will show that the latter would not have been adopted by the tribunal of last resort if it had come up for consideration. The case in the House of Lords, being then still unreported, is not cited in the Alhambra case. It is not important, however, to consider how far the case of the Alhambra would be regarded as authority in this Court, because the learned Judge below (Record, p. 22, at the foot of the page), has found that "there existed at the time of the making of the Charter a general custom in the Atlantic ports of the United States with reference to Charters similarly worded, that a ship may be ordered to any safe port within the range where commerce is carried on, *whether she could get into it or not, provided there is an anchorage near the port customarily used in connection with it, and where it is reasonably safe for the ship*

to lay and discharge." Under this custom, it is not denied that it was entirely within the right of the charterers to send the Gazelle to Aalborg, provided the anchorage outside was reasonably safe for her to lie and discharge afloat. This custom, it is the presumption of law, was known to both the ship owner and charterers at the time of making the Charter Party, and they are equally presumed to have contracted with reference to it. Both must be presumed also to have known the facts found by the learned Circuit Judge in regard to the character of the commerce between Aalborg and the ports of Great Britain and the United States. No stronger evidence could have been brought to the mind of the master, that the anchorage was reasonably safe for the purposes of his voyage than the fact, which he was bound to know, that it was "customarily" and safely used, for like purposes, both by vessels incapable of crossing the bar at all and others capable of crossing it when lightened of a portion of their cargo. He knew that the charterers were bound to know and did know these facts, as well as he did. He therefore had no right to think and could not fairly have believed, when he signed the Charter Party, that those essential facts were not in the contemplation of the charterers, and that in view of them they would not naturally assume that what was "customarily" done by other vessels could be done by the Gazelle. He had no ground for supposing that in reserving the right to send the vessel to ports of the character named on the coast of Denmark, the charterers could or did imagine that Aalborg was not fairly to be classified with them. It is his contention (see Court's finding, p. 21) that there is but one safe port in Denmark for a vessel of the Gazelle's tonnage, viz.: Aarhus, and yet it is manifest from the language of the Charter Party—"a safe direct Norwegian or Danish port"—that the charterers contemplated more than one. If, therefore, he desired to take no chances; if he desired to assume that what was constantly safe to other vessels

would not be safe to the Gazelle; that the every-day experience of the port was not such as to justify him in taking the risk of the anchorage outside the Limfiord; it was his plain duty to say so, at the time the Charter Party was entered into, and not expose the charterers to the loss and sacrifice of placing a valuable cargo on board, to be straightway unloaded and left on their hands at the port of shipment. It was neither frank nor fair for him to procure a charter by remaining silent under such circumstances, and enforce a restriction afterwards, which would have prevented the charterers from taking his ship if they could have anticipated it. He ought not to be permitted to lie in wait till he had the charterers in his power.

It is not necessary to remind the Court, in this connection, of its own declaration, that charter parties are instruments more or less informal and entitled to liberal construction in furtherance of the real intention of the parties and the usage of trade.

Raymond *vs.* Tyson, 17 How., 53, 59 and 60.

It is supposed to be clear law, that when a vessel is chartered to go to a port or as near thereunto as she can safely get and always lay and discharge afloat; there is no restraint of her right to go to and enter a totally different port, provided it be the nearest safe port of discharge to the port of her destination. In other words, if the master in this case could not anchor and lie safely and discharge at Aalborg, or immediately outside that port, he would have been entitled to go to Aarhus, which, he said was the only safe Danish port for a vessel of his tonnage. In the very case of the Alhambra, before referred to, the vessel was chartered for a voyage from Baltimore to Queenstown or Falmouth for orders, and thence to a safe port in the United Kingdom or as near thereunto as she could safely get, and always lay and discharge afloat. Having arrived at Falmouth, she had received

orders to proceed to Lowestoft and there discharge the cargo. Her draft of water, when loaded, was 16′ 6″. The average high water in Lowestoft harbor was about 16 feet and the average low water about 11 feet, so that plainly the vessel could not enter the bar or deliver her cargo without discharging a part outside. The master, upon arrival, objected to discharging in Lowestoft, and the consignees offered, at their own expense, to lighten the vessel outside sufficiently to enable her to lie always afloat in Lowestoft harbor, should her draft of water so require. The master nevertheless went to Harwich as the nearest safe port and there discharged. The consignees received the cargo under protest and brought suit for damages for breach of the Charter Party. The Court held that the consignees had no authority to order the vessel to Lowestoft, but there was no dispute at all as to the propriety of her going to Harwich, a totally different port, as the nearest safe one. And see *ad idem* Horsley *vs.* Price (11 Queen's B. Div., 244). Indeed, on established principles of maritime law, where the contract of either party is broken, it is the implied duty of the other to do the next best thing, in order to prevent unnecessary loss and the inflaming of damages. (2 Sedgwick on Damages, 118.) If, therefore, the master of the Gazelle had signed the Bills of Lading in the form admitted by the Appellee in his libel (Paragraph 5, Record, p. 2) to have been tendered him, namely, with the words following inserted: "To be landed at Aalborg or as near thereto as the vessel can safely get," he would not have prejudiced his own rights in any particular. If, upon arriving off the Limfiord bar, he had found any good and sufficient reason for not discharging outside, he could have lawfully gone to the nearest safe port for security. He would in fact have but conformed in that regard to the language of the Charter Party itself. The master recognized this, for the Court finds expressly, as already shown (foot of p. 21 and p. 22), that he agreed to sign Bills of Lading at one time containing the words just above

quoted from the charter party, but that for some unassigned reason he changed his mind, only repeating his previous allegation, "that there was no place near Aalborg where he *could* safely lay and discharge *and as he knew beforehand that he would have to go to the nearest safe port* he would not sign any bills of lading which might in any way commit him to anything else." These facts, however, if they are facts, he was quite as fully aware of, when he agreed to sign, as when he afterwards fell away from his agreement. Nor can there be any better evidence than all this that he was aware of his right to go to another port, if he could not lie and discharge safely at the anchorage outside of Aalborg. If he was right in his contention as to the insecurity of the anchorage outside of Aalborg, he must be presumed to have known that his failure to discharge his cargo there would not impose upon him any responsibility for damages and that, on the contrary, he would be entitled to recover from the shippers any loss he might incur by going first to the mouth of the Limfiord and sailing thence, for sufficient cause, to the nearest safe port. How, therefore, he could impair his interests or lose any of his rights by signing the bills of lading as requested, it does not seem easy to perceive. In the case of Shield *vs.* Wilkins (5 Exch., 304) which is recognized and adopted in the later cases, the plaintiff's ship was chartered to proceed to Bolderaa, or as near thereto as she could safely get, and load a full cargo. She went within the harbor, and loaded as much as she could, consistently with getting out over the bar. She then went outside the bar, as near as she could safely get, and requested delivery of the rest of the cargo there, which the charterer refused. *At the time of signing the charter, both parties knew that the ship could not load full cargo inside and get out.* But the Court did not consider that fact, in its judgment, which was against the charterers, upon the meaning of the contract itself. The fact is, that the reason which the Appellee here assigned for refusing to sign the bills of

lading was not true, for in view of the facts found by the Court, it was impossible he could know, as he pretended to know, that he could not safely lie and discharge outside the Limfiord bar. Whether he could or not so lie and discharge was not matter of knowledge, but, at best, of doubt, and he broke his contract, when he chose to assume, at the cost of the shippers, that a doubt was fact.

The fact found by the Court, page 22, that while the shippers agreed to accept bills of lading with the added words in question, they still insisted verbally on their right to have the vessel discharged at Aalborg, cannot, it is believed, affect the rights which could only be determined by the terms of the contract and the principles of law applicable to its construction and enforcement.

It will be observed that the Charter Party, Rec. foot of page 4, provides expressly that lighterage, if any, is always to be at the risk and expense of cargo, so that the use of lighters was obviously contemplated by the parties, and any expense to the ship, that might result from the use of lighters, was one which at any event the master had not to apprehend.

Third. The Court adjudges (p. 23) to the appellee the full amount of freight that he would have earned if he had completed his voyage and delivered cargo according to his contract. It holds that he procured another charter as soon as he could, and that the time which elapsed (it does not say from what date) before such second charter was procured, was about the time that would have been occupied in the contemplated voyage; and further, that the expenses of the ship in port were not less than they would have been on that voyage.

The general principle regulating damages in cases of this sort is, of course, too well established for controversy, and the shipowner who is prevented from performing a voyage by the wrongful act of the charterer, is, *prima facie*, entitled to the freight he

would have earned, less what it would have cost him to earn it. If he has earned or might have earned other freights, or has or might readily have been benefitted by the opportunities which the cancellation or defeat of the contract affords him, this must be taken into account.

Scrutton on Charter Parties, 256–259.

Of course indemnity is the guide and principle in all such cases and a man's loss by the breach of a contract is only his net loss: *i. e.*, what he loses primarily, less what he gains, or ought to have gained, incidentally or otherwise. If he gets or might have got a better charter, the day after he lost the benefit of a previous worse one, he is obviously gainer and not loser by the transaction. The doctrine is fully and ably presented by the Supreme Court of Massachusetts in

Bailey *vs.* Damon, 3 Gray, 96.

All the attendant circumstances must be considered, to determine what will be proper indemnity. And see

2 Sedgwick on Damages, 7th Edit. 118 n. a.

The Potomac, 105 U. S., 630.

This latter was a collision case, but the principle of simple indemnity is there applied also, and the party claiming is held to have the onus of proving his loss.

In Wilson *vs.* Hicks (26 L. J. Exch. 242–3), which was an action on a Charter Party for not loading a cargo, and where the entire question was raised and discussed, Pollock C. B. thus states the rule, on page 243;

"The rule, in all cases where the Plaintiff seeks to recover damages for breach of contract, where the amount of damages depends on the conduct of the party, is, that, *prima facie*, he is entitled to the full measure of damages; but the jury are to take into consideration all the circumstances, and, if the plaintiff has acted unreasonably, then they may diminish the damages on that account.

There is no rule of law that the plaintiff must necessarily recover the full amount of the freight, but it is a rule of law that the captain, in such cases, is bound to do what is reasonable, under the circumstances."

If this be law as is believed, beyond dispute, the Circuit Court, it is submitted, did not conform to it.

The course of the Appellee was, to say the least, a singular one, not admitting justification. On the 6th of July, 1881, as his pleadings admit, he refused to sign bills of lading to Aalborg, and demanded bills to a different port, which Appellants refused. According to his contention, on that day the contract was broken and his rights under the breach accrued. On the 11th of July, 1881, he filed his first Libel against the cargo (then all on board), alleging the breach and claiming demurrage. The Appellants having refused to remove the cargo, he kept on filing amended and supplemental Libels (three in number), down to the 23d of August (p. 14), claiming further demurrage and expenses as has been stated—instead of removing the cargo, as upon his theory, was his right. There is no finding that he made any effort to get another charter during all that time. He clearly could not have done so, consistently with his pertinacious effort to force the charterers to send him forward to some other port than Aalborg, with the cargo which he kept on board. His scheme obviously was to treat himself as still—notwithstanding the breach of the contract—entitled to claim demurrage under it, which might be as profitable as a voyage and was easier than one, by a great deal. The fact that he procured a new charter on September 2d (Court's finding, p. 23), only ten days after he discharged the cargo (p. 13), is very significant proof of what he might have done by earlier efforts.

These are "circumstances" established by the record, but not considered at all by the Court.

Besides, the learned Circuit Judge has entirely overlooked the

fact that if the voyage had been performed, and full freight carried, the Gazelle would have found herself empty, at a port of Denmark or Norway, with a new charter to seek, if one could be obtained, or a return voyage in ballast to the United States or elsewhere, to seek the charter which she obtained here, without leaving the port. What freight she obtained on the new charter the Circuit Court does not find. It may have been at much higher rates. Whether she could have obtained one in Denmark or Norway is not found either. Are these not all "circumstances," the knowledge of which is essential to the determination of the question of indemnity? But even what is found demonstrates, beyond peradventure, it is respectfully submitted, that the Gazelle, at the expense of the Appellants, was kept in the port of Baltimore, safe from all the risks of the voyage proposed, until she could get a cargo there to suit her, without even the effort of seeking one in New York or elsewhere. Can she be entitled under such circumstances to her entire net freight and be charged with no benefits at all? Was she chargeable with no misconduct in the delays and vexatious proceedings which we have noted? Was the conduct of the Appellee "reasonable" as required to be by the ruling of Ch. B. Pollock?

The learned Judge gave the Appellee $3285.60, his entire gross freight (assuming that his time and expenses in port were about equal to what his voyage would have occupied and cost) and over $530 for expenses. The whole amount claimed by him in his libels, was only $2472.

S. T. WALLIS,
HENRY C. KENNARD,
For Appellants.

SUPREME COURT

—OF THE—

UNITED STATES.

OCTOBER TERM, 1888.

MEISSNER, ACKERMANN & CO., Appellants,

vs.

HERMAN BRUN, Master of the NORWEGIAN BARQUE GAZELLE.

Appeal from the CIRCUIT COURT for the District of Maryland.

BRIEF FOR APPELLEE.

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OCTOBER TERM, 1888.

MEISSNER, ACKERMANN & CO., Appellants,

vs.

HERMAN BRUN, Master of the NORWEGIAN BARQUE GAZELLE.

Appeal from the CIRCUIT COURT for the District of Maryland.

BRIEF FOR APPELLEE.

This is an appeal from the decree of the Circuit Court for Maryland on Cross Libels on a charter party, the master of the vessel having filed in the District Court libel against the cargo of the vessel, 3,131 barrels of Petroleum, for alleged breach of the charter by the Appellants, the charterers; and Appellants, charterers, having filed a libel against the vessel for alleged breach of the charter.

The District Court dismissed the libel of the charterers, and decreed damages to the vessel for breach of charter by the charterers.

On appeal to the Circuit Court it was decreed, on April 26th, 1885, that Brun, master, libellant and Appellee here, recover for breach of the charter $3,826.13, with interest from September 2d, 1881, and costs in both Courts, and that the libel of Meissner, Ackermann and Company, charterers, and Appellants here, be dismissed, with costs to the vessel in both Courts.

Findings of fact and conclusions of law are found on Pages 21, 22 and 23 of the Record, and final decree in said Court on Pages 23 and 24 of the Record.

The libels were filed by the master of the vessel, claiming for breach of the charter the demurrage fixed therein, and for further and other relief.

The Circuit Court, affirming the District Court, awarded damages to the vessel to the amount of freight under the charter for the cargo loaded, $3,288.60, and for expenses in removing and storing the cargo after the refusal of the charterers to order the vessel to another port than Aalborg (the one they had ordered her to, and which the Court held was not within the charter), $507.03, and for wharfage $17.10, and for towing $16.00, being in all $3,826.13, with interest as before mentioned.

The findings of fact and conclusions of law are as follows:

Proceedings in the Circuit Court.

Findings of fact and conclusions of law. Filed 22nd April, 1885.

In the Circuit Court of the United States for the District of Maryland. In Admiralty.

Appeal from the District Court.

HERMAN BRUN, Master of the Norwegian Barque "Gazelle,"

vs.

3,131 BARRELS OF PETROLEUM, Cargo of the Barque,

And

MEISSNER, ACKERMANN & CO., Charterers,

vs.

THE BARQUE "GAZELLE."

Cross Libels on Charter Party.

Findings of fact.

On June 16th, 1881, the barque "Gazelle," a sailing vessel of 571 tons burden, then in the port of Baltimore, Maryland, was chartered by Herman Brun, her master, to Meissner, Ackermann and Company, of New York, for a voyage, as stated in the charter party, to a safe, direct Norwegian or Danish port as ordered on signing bills of lading, or as near thereto as she can safely get and always lay and discharge afloat. Exhibit accompanying the libel is the said charter. Cargo of 3,131 barrels of refined petroleum was put on board by charterers at Baltimore, and on July 6th, 1881, charterers tendered the master bills of lading ordering the vessel to

the port of Aalborg, on the eastern coast of Denmark. The master refused to sign the bills of lading on the ground, as stated by him to charterers, that Aalborg was not a safe port for vessels of the tonnage of the "Gazelle," and that no vessel of such tonnage could enter the port even in ballast, and that there was no anchorage near the port where he could with safety lay and discharge. The charterers refused to order the vessel to any other port. Conversations and correspondence took place between the master and charterers and their agents. In all these the master insisted that he could take the cargo to the port of Aarhus, which he said was the only safe Danish port for a vessel of such tonnage as the "Gazelle," but he could not discharge at Aalborg or convey the cargo there. The charterers, on the contrary, insisted that he could and was bound to discharge at Aalborg. During this discussion between the parties, and on one day, the master said he would sign the bills containing the words "as near thereunto as the vessel can safely get and always lay and discharge afloat," but on the same day, upon charterers assenting to this, he refused, saying, in effect, that he knew the fact to be that there was no place near Aalborg where he could safely lay and discharge, and as he knew beforehand that he would have to go to the nearest safe port, he would not sign any bills of lading which might in any way commit him to anything else. The charterers all this time insisted that he should discharge at Aalborg, and did not agree to any receding from this in assenting to adding the above words on the bills of lading, but still insisted on their right to have the vessel discharged at Aalborg.

Nothing was done in consequence of this proposition of the master or of his subsequent refusal as aforesaid, which in fact altered the position of the parties in any way.

The tonnage of the "Gazelle" was 571 tons, and she drew, when loaded, 16 feet 3 inches, and in ballast, 12 feet.

The port of Aalborg is in Denmark, on the south bank of the Limfiord, about 17 miles from its mouth at the Cattegat Sea. At the mouth there is a bar about 2,000 feet wide, on which there is ordinarily ten feet of water, and never more than eleven feet. Off the mouth of the Limfiord there is no sheltered bay nor any indentation of the coast, but the coast runs in a straight north and south line. It was not possible for the "Gazelle" to pass the bar either in ballast or with cargo, and the only place of anchorage for a vessel which cannot cross the bar is in the Cattegat Sea off the mouth of the Limfiord, and the only mode of discharge at said anchorage is into small sailing coasters, which can pass the bar to the port of Aalborg and carry the cargo. A considerable commerce has been carried on with the port from time immemorial by vessels of very small draught able to cross the bar when loaded.

Some steamers of larger draught have in late years traded regularly with the port from England.

These have lighters expressly made for their purpose, which they take

in tow going out, receiving from them part of the cargo when over the bar, and in returning discharge into them sufficiently to lighten to 10 feet, and then tow the lighters in with them.

Thirty-one cargoes of petroleum and grain have been exported to Aalborg from the United States since 1876; none before that time. Many of these were in vessels of such size as to be able to cross the bar after lightening a reasonable amount.

Of these 31 vessels, two or three in all, of large size, have discharged their whole cargo outside.

There existed at the time of the making of the charter a general custom in the Atlantic ports of the United States, with reference to charters similarly worded, that a ship may be ordered to any safe port within the range where commerce is carried on, whether she can get into it or not, provided there is an anchorage near the port customarily used in connection with it, and where it is reasonably safe for the ship to lay and discharge.

The port of Aalborg and the Limfiord inside the bar are safe for vessels that can get into them and lay afloat. The water inside the bar in the Limfiord is deep, except at or near the town of Aalborg, but the said anchorage outside the bar in the Cattegut is not a reasonably safe anchorage, nor a place where it is reasonably safe for a ship to lay and discharge.

The amount of freight under the charter for the cargo loaded was $3,285.60. The master incurred expense of $507.03 in removing and storing the petroleum cargo after the refusal of charterers to order vessel to any other port than Aalborg, and $17.10 for wharfage and $16.00 for necessary towing.

The time required to perform such a voyage as that stated in the charter would have been about the same time as elapsed before the vessel procured another charter, which other charter was procured as soon as could have been done, and on the 2d day of September, 1881, the vessel was ready to load under the re-charter, and the expenses of the vessel in port were not less than on the voyage.

Conclusions of Law.

1st. That Herman Brun, libellant and Appellee, is entitled to recover for breach of the charter party in the findings of fact mentioned damages in the sum of three thousand, eight hundred and twenty-six dollars and thirteen cents, with interest from September 2d, 1881, with costs in both Courts.

2d. That the libel of Meissner, Ackermann and Company against the barque "Gazelle" should be dismissed, with costs to the claimants of the barque in both Courts.

HUGH L. BOND,
Circuit Judge.

The decree of the Circuit Court is as follows:

Final Decree. Filed 22 April, 1885.

In the Circuit Court of the United States for the District of Maryland, in Admiralty.

HERMAN BRUN, Master of the Barque "Gazelle,"

vs.

3,131 BARRELS PETROLEUM

and

MEISSNER, ACKERMANN & Co., Charterers,

vs.

THE BARQUE "GAZELLE,"

Appeal of Charterers from Decree of the District Court.

Cross Libels on Charter Party.

This cause being finally heard, and the pleadings, evidence and arguments being duly considered, it is by the Court, this 21st day of April, 1885, adjudged, ordered and decreed that Herman Brun, libellant and Appellee, recover damages for breach of the charter party in the proceedings mentioned—the sum of three thousand, eight hundred and twenty-six dollars and thirteen cents, with interest from September 2d, 1881, with costs in both Courts, and that Thomas Poultney, Jr., and William T. Poole, stipulators for 3,131 barrels of Petroleum, cargo of the barque "Gazelle," pay the amount of their stipulation, being $3,737.00, to said libellant or his proctor within ten days from the date hereof, and that the claimant and respondent pay the balance of said damages and the interest as aforesaid and costs within ten days from the date hereof; and it is further adjudged, ordered and decreed that the libel of Meissner, Ackermann and Company against the barque "Gazelle" be, and the same is hereby, dismissed, with costs to the claimants of the barque in both Courts.

HUGH L. BOND,
Circuit Judge.

The Appellee contends:

1st. That in the findings of fact in the Circuit Court no debatable question is left to the Appellant.

2d. On the hypothesis that there is any such legal question arising in the findings the Appellee contends:

That the master was right, if his objection to the port named by charterers was valid, in objecting at the time he was ordered, and not by

protesting and trying or pretending to try to make the named port, if in fact and law it was not a safe port, within the charter.

The Maggie Moore, 7 Federal Reporter, 620.
The Gazelle, 11 Federal Reporter, 427.

That by uniform authority, a safe port is a port into which the chartered vessel can safely enter and discharge cargo, and a vessel so chartered is not bound to go to a port which she cannot enter and discharge in, even if there is a safe anchorage a short distance off the port, but not the port where she might safely lie and discharge cargo, that the only exception supported by some authority is that she may be bound to go when by moderate lightering outside in a safe anchorage she can then safely enter the safe port and make there her final and general discharge of cargo. This has been decided both in cases where the ship claimed the right to discharge cargo short of reaching the port, and where charterers claimed that ship ought to discharge outside of the port, or character of port, provided in the charter; that there is in law under charters to convey cargo to a port and there discharge but one voyage and discharge provided for, there must be some one place where the voyage of the vessel ends and from which lay-days can begin to count. The cargo may have to be lightered but this must be in the port, and the only possible exception is a very slight lightering as before stated to pass over some bar over which with very slight decrease of draft and no loss to the vessel—the vessel can safely pass over into the port.

In this case the findings of fact show that the vessel could not enter the port of Aalborg even in ballast, and if she undertook to lay at anchor in the place claimed for her by Appellants she must (not lighter) but transship the whole cargo into small sailing coasters who, after receiving the cargo from her, would convey it to the port where their light draft enabled them to enter. This is to end the voyage outside and at a great distance from the port, and to transfer the cargo into other vessels who then begin a new voyage with the cargo.

No authority can be found anywhere for this assumption on the part of Appellants.

The Gazelle, 11 Federal Reporter, 427.
The Maggie Moore, 7 Federal Reporter, 620.
Capper vs. Wallace, 2 Queen's Bench Division, 166.
The Alhambra, 5 Probate Division, 256.
The Alhambra on Appeal, Law Reporter, 6 Probate Division, 68.
Hilstrom vs. Gibson, 8 Session Cases, 463.
Nelson vs. Dahl, 12 Chan. Division, 568.
Ogden vs. Graham, 1 B. and L., 773. 31 Law Journal. B., 26.

Geipel vs. Smith, Law Reporter, 7. Q. B., 404.
Schilizzi vs. Derry, 4 E., B., 873.
Bastifel vs. Lloyd, 1 H. and C., 388.

But the Court found the following custom:

"There existed at the time of making of the charter a general custom in the Atlantic ports of the United States with reference to charters similarly worded, that a ship may be ordered to a safe port within the range where commerce is carried on whether she can get into it or not; provided there is an anchorage near the port customarily used in connection with it, and where it is reasonably safe for the ship to lie and discharge."

This custom, being in derogation of well-established law, must be strictly construed, and the Appellants submit that the anchorage set up in this case was not within the custom found, because the facts found by the Court do not show that this anchorage was customarily used in connection with the port of Aalborg. The custom as found must be taken to mean not only that the place is an anchorage within the general meaning of that term (that is, a place of safety, a haven, a refuge from storms), but that its use as an anchorage must be in connection with the port as an out-port, not the port or as anchorage roads; not the port, but so connected with it as to be fairly said to be used in connection with and as an addition to it.

To apply the fact here, the alleged anchorage was the open Cattegat Sea, while the port of Aalborg was 17 miles up a fiord or river or bay, and where any vessel which could enter the port of Aalborg had a safe anchorage in the port itself.

If vessels, sometimes in summer, too deep in draft to go up to Wilmington, North Carolina, should anchor off Hatteras on the Atlantic Ocean, could it be fairly said that the Atlantic Ocean off Hatteras was an anchorage used in connection with the port of Wilmington?

The custom as found is besides illegal and in destruction of the contract.

The Alhambra, Law Rep. 6, P. D. 68.

But the Court also found other facts in regard to this alleged anchorage, and found as a fact that the said anchorage outside the bar in the Cattegat is not a reasonably safe anchorage nor a place where it is reasonably safe for a vessel to lie and discharge.

The Court finds this custom in derogation of plain law and then finds that the anchorage was not within the custom found.

The Appellants made a point below and it is supposed will make it here on the following part of the findings of fact:

"Conversations and correspondence took place between the master and charterers and their agents. In all these the master insisted that he

could take the cargo to the port of Aarhus, which he said was the only safe Danish port for a vessel of such tonnage as the 'Gazelle,' but he could not discharge at Aalborg or convey the cargo there. The charterers on the contrary, insisted that he could and was bound to discharge at Aalborg. During this discussion between the parties, and on one day, the master said he would sign bills containing the words: 'As near thereunto as the vessel can safely get and always lie and discharge afloat,' but on the same day, upon charterers assenting to this, he refused, saying, in effect, that as he knew the fact to be that there was no place near Aalborg where he could safely lie and discharge, and as he knew beforehand that he would have to go to the nearest safe port, he would not sign any bills of lading which might in any way commit him to anything else. The charterers all the time insisted that he should discharge at Aalborg, and did not agree to any receding from this in assenting to add the above words on the bills of lading, but still insisted on their right to have the vessel discharged at Aalborg. Nothing was done in consequence of this proposition of the master or his subsequent refusal as aforesaid, which in fact altered the position of the parties in any way."

The Appellants seek to make this proposition, when assented to by them as above, a compromise or new contract. The mere statement of the facts shows the contrary.

The language of the District Judge in his opinion on this point, 11 Federal Reporter, 435, 436, may be quoted here as fully answering this point:

"It has been urged on behalf of charterers that the master having after this controversy had arisen proposed to the agents of the charterers to sign the bills of lading provided the words 'or as near thereunto as she can safely get and always lie and discharge afloat,' were interlined and their agents, after only sufficient delay to communicate with the charterers, having agreed to accept the bills of lading so amended, that this was a compromise and constituted a new agreement from which the master could not recede.

"But to my mind this was not a compromise—the bills of lading before the proposed amendment expressed that they were subject to all the conditions of the charter-party and the interlineation was merely putting there a portion of the very language of the charter. Nothing was done in consequence of the proposition which in the slightest way altered the position of either party. The master seems to have been persuaded that the interlineation would be sufficient to call the attention to the fact that he objected to the port and could not go there, but subsequently he concluded that as he knew he could not safely undertake to deliver the cargo at the port or near it, he ought not to sign a bill of lading purporting that he was going to attempt it. In this I think he was right."

The Court found (page 23 of Record) that:

"The amount of freight under the charter for the cargo loaded was $3,285.60. The master incurred expense of $507.03 in removing and storing the Petroleum cargo after the refusal of charterers to order vessel to any other port than Aalborg, and $17.10 for wharfage and $16.00 for necessary towing. The time required to perform such a voyage as that stated in the charter would have been about the same time as elapsed before the vessel procured another charter, which other charter was procured as soon as could have been done, and on the second day of September, 1881, the vessel was ready to load under the re-charter, and the expenses of the vessel in port were not less than on the voyage."

These findings conclude the question of law on the point of damages, and the conclusions of law are right and should be affirmed.

A. STIRLING,

Proctor for Appellee.